

*'THE STATE' AND OTHER BASIC TERMS IN PUBLIC LAW**

In South Africa there are two sorts of constitutional and administrative lawyers: those who like to have their terminology, principles and rules nicely classified and meticulously defined, and those who don't really care. The former, who usually follow the Continental (and particularly German) tradition, expend a good deal of effort trying to define some fairly basic terms such as 'the State' before proceeding to the substance of the subjects. For that they deserve praise for having the courage to pursue this daunting task. The latter (rather small) group don't seem much concerned with such precision, yet seem to get along relatively well without it, even in court. Partly this is not their fault, since Parliament itself appears to have difficulty in being consistent when it uses basic terms in its statutes. Words such as 'the Republic', 'the State', 'the Government', 'State Revenue', 'Executive' and so on are tossed about with gay abandon in one of our most important statutes.¹ In other enactments we find gentlemen who are called the 'Public Debt Commissioners',² and bodies that are called the 'National Transport Commission',³ the 'National Health Policy Council',⁴ the 'State Tender Board'⁵ and the 'State Trust Board'.⁶ Those who take concepts seriously will find, to their astonishment, that even 'the Republic' changes its size from statute to statute.⁷

The fact that 'the State' continues to function (with frightening efficiency) despite this welter of confused terminology would seem to indicate that there is no need—apart from the virtue of consistency—for precise, all-embracing definitions of the State. None the less, even the pragmatists (to give ourselves a polite epithet) should not allow themselves to be struck dumb when students ask awk-

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To avoid constant variation—statutes normally refer to 'the State'—the word 'State' will start with a capital 'S' throughout this article.

¹ Republic of South Africa Constitution Act 32 of 1961 (hereafter referred to as the Constitution Act).

² Public Debt Commissioners Act 2 of 1969.

³ Transport (Co-ordination) Act 44 of 1948 s 3.

⁴ Health Act 63 of 1977 s 10.

⁵ State Tender Board Act 86 of 1968.

⁶ State Trust Board Act 88 of 1979.

⁷ Cf the Interpretation Act 33 of 1957 s 2 *sv* 'the Republic', with the Internal Security Act 44 of 1950 s 1(1) *sv* 'Republic' and the Government Service Pension Act 57 of 1973 s 1 *sv* 'Republic'.

ward questions such as 'what is "the State"?' or 'what do you mean by "the Government", "executive" and "the administration"?'

This discussion seeks to describe how some of these terms are used in our law. To do so, reference will be made to statutes and cases which, contrary to what some lawyers seem to suppose, actually *constitute* the law. Some generalizations will be drawn, but I dare not claim to formulate general definitions; unfortunately there will not be much for those who go in for metaphysical dogmatics, and to them I apologize. Nevertheless, with a bit of luck I hope to be able to conjure up some explanations for pragmatists to give hyperactive students. But first the historical and philosophical background to the confusion.

HISTORY

(a) 'Gubernaculum' and 'Jurisdictio'

At least so far as the modern world is concerned, 'government' (from *gubernaculum*) came before 'the State'.⁸ In fact 'government' was not even used in the 'political' sense in which we now understand it; rather, it was closely linked to the law-declaring function of jurisdiction (*jurisdictio* or *jus dicere*), and the idea that to 'govern' implied anything more than the judicial application of preordained law was foreign to early medieval men.⁹ 'There could, therefore, be only one "function" of government—the judicial function; all acts of government were in some way justified as aspects of the application and interpretation of the law.'¹⁰ The heathen ideas of ancient Greece and Rome were all but forgotten, and the *jus dicere* notion of government thoroughly suited the medieval idea that original power was located in God and that all power *descended* from above.¹¹ The idea of earthly man actually *making* laws was a heresy. At that stage the earthly king was no more than a natural, flesh-and-blood man: 'The medieval king was every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him.'¹²

During the thirteenth century men such as Bracton began to recognize that not all 'government' ought to be the subject of 'adjudication', and they separated the *gubernaculum* from the *jurisdictio*, the former representing a narrowly defined area of power of which the king was sole administrator.¹³ The distinction drawn by

⁸ For example, Walter Ullmann *Medieval Political Thought* (reissue 1975) 17. (Cited hereafter as Ullmann.)

⁹ *Ibid.*

¹⁰ M J C Vile *Constitutionalism and the Separation of Powers* (1967) 24. (Cited hereafter as Vile.)

¹¹ Ullmann 13.

¹² F W Maitland 'The Crown as Corporation' (1901) 17 *LQR* 131 at 132.

¹³ See, generally, Charles Howard McIlwain *Constitutionalism Ancient and Modern* (1940) 79–94. (Cited hereafter as McIlwain.) There was nothing particularly exceptional about this *gubernaculum* or prerogative: such rights were really only 'intensified private rights' (Frederick Pollock and Frederic William Maitland *The History of English Law* 2 ed (1898) (reissue 1968) I 512).

Bracton was 'nothing but a commonplace of late thirteenth century European political theory'.¹⁴ At about this time the 'ascending theory' of the origins of original power began to re-emerge to compete with the theocratic, 'descending theory' that had held sway during the Middle Ages.¹⁵ Thomism reintroduced the ancient concept of politics, and political science (*scientia politica*) was born.¹⁶ Until this stage the term 'State' did not exist in the sense in which we now use it. The term used for what we might call the body politic was *civitas*.¹⁷ Indeed, the ecclesiastical structure of Europe at the time precluded any such use of 'State'. For instance, the differences between Thomas à Becket and Henry II of England, and between Pope Gregory VII and the German King Henry IV, so often described as 'battles between Church and State', were in fact battles *within the Church*.¹⁸ Nevertheless, their struggles represented the growing tensions between the theocratic and feudal kingship, and within them lay the nascent concept of the State.

(b) 'Legislative' and 'Executive'

In the ensuing period the notion of an earthly 'legislative' power began to emerge, yet even as late as the seventeenth century this was seen to be part of the all-embracing concept of *jurisdictio*: Parliament simply advised the king 'and declared the law as a court declares it, but in a more formal way, and usually, but not always, in general terms'.¹⁹ The recognition of a sphere of *gubernaculum* separate and distinct from *jurisdictio* added to the need for legislation in order to articulate more precisely the boundaries between the two powers.²⁰ And with the notion of law-making developed the corollary: law-implementation, or execution of the law—hence *executive*.²¹ Borrowing on ancient ideas on the 'tasks' of government, Marsilius of Padua in the fourteenth century²² appears to have been the first to use the term 'executive'; nevertheless, he still saw the executive function as being part of the overall concept of *jurisdictio*, one aspect of the business of settling disputes and maintaining the king's peace.²³ *Jurisdictio* was divided into legislation and execution; executive was not, at that stage, related to *gubernaculum*. For where-

¹⁴ McIlwain 80. For instance, the distinction in Holland was expressed by the terms *politie* and *justitie* (see, for instance, G N Clark 'The Birth of the Dutch Republic' (1946) 32 *Proceedings of the British Academy* 189 at 196; cited hereafter as Clark). However, the subsequent development of this distinction followed a very different pattern from that in England.

¹⁵ Ullmann 12-13. In his *Principles of Government and Politics in the Middle Ages* 4 ed (1978) Ullmann suggests that the *gubernaculum* remained as a hangover from the descending, theocratic thesis of kingship, and that the feudal concept of jurisdiction, at least in England, provided the catalyst by which the ascending concept of *jurisdictio* replaced the descending one (at 117-18 and, generally, ch 3).

¹⁶ Ullmann *Medieval Political Thought* ch 7.

¹⁷ *Idem* 177.

¹⁸ *Idem* 121-2, 136-8.

¹⁹ Vile 24.

²⁰ *Idem* 26.

²¹ *Idem* 21-6.

²² Quoted by Vile 27-8.

²³ Wherein lies the key to an understanding of the origins of judicial review of administrative action.

as *gubernaculum* referred to that portion of the king's private affairs of which he was sole administrator, unfettered by legal prescriptions, the *executive* function referred to the *implementation* of laws: the former was, in more modern terms, 'government' according to policy or discretion, while the latter was 'government' according to law. Although used in England in its present sense as early as 1649 by Selden and, of course, John Locke (in 1689),²⁴ 'executive' as we use it at present was not to be popularized until after the American Revolution, when it came to be substituted for the hated royal prerogative in various State Constitutions.²⁵

(c) 'Government' and 'Administration'

If 'executive' was still firmly within the realm of *jurisdictio*, what of *gubernaculum*, the medieval term for 'government'? As late as the seventeenth century *gubernaculum* was still a term that referred exclusively to those regal powers of the king *delimited* (or *restricted*), but not *controlled*, by the law.²⁶ In this respect *gubernaculum* seems to have coincided with those aspects of the king's prerogatives which were regarded as *absolute*, that is, uncontrolled by law.²⁷ The affairs which the king could deal with as a matter of *gubernaculum*, such as maintaining the peace of the realm, we would today class as aspects of 'government', usually meaning by that 'executive government'. Yet *gubernaculum* and 'executive' were not linked until the triumph of Parliament towards the end of the seventeenth century in England, when the *control*, if not yet the *possession*, of the *gubernaculum* was wrested from the Crown. Indeed, prior to that the power of *gubernaculum* was simply the king's power to administer or manage the affairs of his realm as a form of property. *Gubernaculum* was effected by what we might call 'administrative', not 'legal', orders; his affairs were *administered*.²⁸ And this was the sense in which the English term 'government'²⁹ seems initially to have been used in the fourteenth century when it first appeared: 'governors' were appointed to manage the affairs of territories, men 'governed' their wives, etc.³⁰ 'Government' seems to have been applied to the management of the *political* affairs of a country only in about 1553.³¹ Thus Locke and even Montesquieu really distinguished *four*,

²⁴ See *Oxford English Dictionary* (OED) sv 'Executive' 3b.

²⁵ Raoul Berger *Executive Privilege: A Constitutional Myth* (1974) 51ff. Note, however, that the new 'executive power' in the American Constitutions in no way incorporated the common law royal prerogative (see Berger 56ff).

²⁶ Cf C H McIlwain 'The Historian's Part in a Changing World' in *Constitutionalism and the Changing World* (Collected Papers by C H McIlwain) (1939) 1, 23.

²⁷ On which, see, for instance, William S Holdsworth *A History of English Law* IV 1 ed (1924) 204-7 (3 ed (1945) 204-8). Cf McIlwain *Constitutionalism Ancient and Modern* 113-14.

²⁸ See McIlwain 84ff.

²⁹ Derived directly from the French *gouvernement* but ultimately from the Latin *gubernaculum* (OED sv 'Government').

³⁰ OED sv 'Governor'.

³¹ OED sv 'Government' 6.

not three, functions of 'government': the legislative, the executive, the 'prerogative' (*gubernaculum*), and the judicial.³²

During the course of the Puritan and Glorious Revolutions of the seventeenth century Parliament wrested the sovereign initiative from the king and thereby restored the supremacy of the concept of *jurisdictio*, which embraced the notions of legislation and execution (that is, execution of 'judicial' sentence³³). The *judicial* function had by then begun to emerge in its own right, and the way was open for the *gubernaculum*, the power of the sword, to be included under the theoretical notion of execution.³⁴

'Government' itself came to be adopted as a general term covering all three functions, legislative, executive and judicial, and 'the Government' covered all the various organs of State. Thus England's only comprehensive, written Constitution was Cromwell's Instrument of Government of 1654 (during the Interregnum). Nevertheless, 'government' has always retained traces of its 'gubernatorial' origins and, as we shall see, it is more commonly used as a specific reference to the executive and administrative branch, and the executive, administrative and, particularly, policy-making functions of 'government'.³⁵

Here we might also note that the term 'administration' began to be used as a substitute for the term 'government', in so far as this latter related to the management of public affairs, in about 1681,³⁶ and as an imprecise reference to the 'executive' branch of government in 1731.³⁷ However, right up until the nineteenth century the term was closely allied to the 'administration of justice', simply because England was still largely administered via judicial machinery until the late eighteenth century.³⁸ This explains the link between the 'executive' and the 'administration': affairs of government were 'administered' ('executed') in the same way as orders of courts were 'executed'.

(d) *The 'State'*

'State' derives from the Latin *status*.³⁹ But immediately it should be added that the Latin term which denoted legal capacity in the eyes of the law underwent considerable transformation in meaning before it spawned 'the State'.⁴⁰ Failure to appreciate this leads to the

³² Vile 87.

³³ Vile 55.

³⁴ Vile 55ff. The process of subjecting the *gubernaculum* to law and hence *jurisdictio* had in fact begun much earlier and was a feature of the events surrounding the extraction from King John of the Magna Carta of 1215: See J C Holt *Magna Carta* (1965), especially ch II.

³⁵ See 227 below; and cf OED sv 'Government' 7b.

³⁶ OED sv 'Administration' 4.

³⁷ Ibid 5.

³⁸ See further A Dunsire *Administration: The Word and the Science* (1973) 5. (Cited hereafter as Dunsire.)

³⁹ See, for example, Marinus Wiechers *Staatsreg* 3 ed (1981) 5.

⁴⁰ See especially the exacting article by H C Dowdall 'The Word "State"' (1923) 39 LQR 38 (cited hereafter as Dowdall); and Kenneth H F Dyson *The State Tradition in Western Europe* (1980) 25ff (cited hereafter as Dyson).

tempting mistake of assuming that, by its very etymology, the 'State' has *inherent capacity*. Likewise, Dowdall argues very strongly that men such as Jellinek⁴¹ were wrong in suggesting that 'the word "State" derives from *status* as used in the fifteenth century for a *political constitution*'.⁴² Rather, he proposes, the word derives more directly from the Italian *stato*, 'meaning the *status* or estate of an effectively sovereign prince, together with the rights and powers belonging thereto, and that the word was subsequently applied to the sovereign power, *however constituted*'.⁴³ In arguing his proposition, Dowdall shows that by the thirteenth century *status* was beginning to lose its exclusively legal connotations.⁴⁴ It came to refer, along with the terms 'estate', '*stato*' and '*estat*', to *persons* occupying positions of authority or eminence, as well as their *property* and insignia, in addition to the *eminence* or *authority* of such persons (*status*) *itself*.⁴⁵ By Machiavelli, *stato* was used as a verb to describe the technique of government of a 'State', but only because at that time it was seen in no other light than government of an estate (that is, managing the affairs of one's property). Thus when Cardinal Rohan said to Machiavelli that the Italians did not understand war, Machiavelli replied that the French did not understand *stato*.⁴⁶ In fact, the contemporary report of this incident in French translates *stato* as *maniement d'affairs*. *Stato*, at that time, meant *government*. From this Machiavelli derived his definition of a State as an *effectively sovereign government*.⁴⁷ It was only later that those being *governed* came into the picture at all, thereby introducing an element of *corporateness* into the concept of 'State'. Only by understanding the contemporary meaning of 'State' or '*état*' can we make any real sense of Louis XIV's remark (if he ever made it⁴⁸): '*L'état, c'est moi.*' What he was saying in adjusted English was 'I am the government', not 'I am the State'.⁴⁹

Of course, the gradual emergence of separate 'States' in Europe greatly contributed to the evolution of the word. The 'estates' of 'sovereign princes' grew larger, and it was natural that State should come to refer to a whole country as well as the governing of it. Indeed, it was the Dutch Revolt that accelerated this development; in the United Provinces the term *Staat* was expanded rapidly, with the 'States' of the provinces becoming more and more closely, though not completely, identified with the provinces themselves.⁵⁰

⁴¹ Georg Jellinek *Allgemeine Staatslehre* 3 ed (1914) ch 5.

⁴² Dowdall 99 (my emphasis). ⁴³ *Idem* 102 (my emphasis).

⁴⁴ *Idem* 103.

⁴⁵ *Idem* 103-9.

⁴⁶ *Idem* 109.

⁴⁷ *Idem* 111.

⁴⁸ It seems that he probably did not (see Gianfranco Poggi *The Development of the Modern State: A Sociological Introduction* (1978) 161n15).

⁴⁹ Cf Dowdall 119; Dyson 137.

⁵⁰ So, for example, Grotius, writing in the early seventeenth century, qualifies his reference to the 'States' by specific reference to the '*ridderschap, edelen ende goede steden*' (*Inleiding* 1.2.17), and, when referring to the Dutch Republic or other 'States' as a whole, he uses the term *gentium* or *civitas* (for example, *De Jure Belli ac Pacis* 1.1.1 and 1.1.14). More than a century later Van Leeuwen still avoids the use of the term 'State' to describe what Kotzé in his

The events in the Netherlands served also to contribute to the nascent conception of the 'political State'. Although 'State' had been used in almost this sense in English as early as 1538,⁵¹ and was sometimes used as a term to distinguish secular matters from ecclesiastical,⁵² it seems that the evolution during the seventeenth and eighteenth centuries of the word, as referring to a body politic, is largely attributable to the influence of the Dutch Republic.⁵³ It is perhaps for this reason that the term is sometimes, though by no means always, associated with republican, as opposed to monarchical, forms of government. Clark quotes a remark, probably apocryphal, which seems to bear this out: 'At the latter end of Queen Elizabeth, it was a phrase to speak, yea for to pray for the Queen and State. This word "State" was learned by our neighbourhood and commerce with the Low Countreys, as if we were, or affected to be governed by States. This the Queen saw and hated.'⁵⁴

By the eighteenth century 'the State' was in regular usage in England.⁵⁵ There were 'Secretaries of State', as the celebrated decision in *Entick v Carrington*⁵⁶ shows, and in which Lord Camden LCJ made his famous remarks about alleged 'State necessity', 'reason of State', 'law of State' and 'State offences': 'the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.'⁵⁷

METAPHYSICS

The 'body politic' is a metaphysical concept by definition. And once 'the State' came to be used as an alternative term, it was not long before 'the State' was thought to have a life of its own. There were traces of this thinking in England,⁵⁸ but the most fertile seed-beds were in Germany,⁵⁹ France and, more recently, Holland, where a wide diversity of theories developed purporting to explain the State as a political and legal phenomenon.⁶⁰

translation calls the 'Confederate State' (*Simon van Leeuwen's Commentaries on the Roman-Dutch Law* translated by J G Kotzé 1 ed (1881) 1.2.12). Van Leeuwen himself uses the term *bondgenootschap* and refers to the provinces not as 'States' but as *provincies* (*provincien*), the term *Staten* being reserved for the 'States' (viz 'estates') within each province (for instance, *Het Roomsche Hollandsch Recht* 1.2.6ff).

⁵¹ By Thomas Starkey in his 'Description of England' (1538). Dowdall (120) doubts whether Starkey could have meant any more than 'the government of the country'.

⁵² Queen Elizabeth's Act of Supremacy of 1559 was "An Act restoring to the Crown the ancient jurisdiction over the State ecclesiastical and spiritual"; but in 1640 the Scots commissioners wrote "church and state" (Clark op cit note 14 above, Additional Note B: 'The Word "State"' 215-16).

⁵³ See Clark 213ff; Dyson 25. Dowdall (123) and Dyson (27) point out the Dutch influence on the German usage of the term *Staat* as well.

⁵⁴ Quoted by Clark (195) from a manuscript dated 1659. Cf Dyson 26.

⁵⁵ Dowdall 122-3.

⁵⁶ (1765) 19 State Trials 1029. The office dated back as far as 1558. ⁵⁷ At 1073.

⁵⁸ See the examples quoted by Dowdall at 122-3. He quotes Matthew Arnold's definition: 'The nation in its collective and corporate capacity.'

⁵⁹ The most prominent exponent of the 'organic theory' of the State in England was F W Maitland, and he was profoundly influenced by the German, Otto Gierke, some of whose work he translated as *Political Theories of the Middle Age* (1900).

⁶⁰ Most of these are ruthlessly analysed in the classic work by Frederick Hallis *Corporate Personality: A Study in Jurisprudence* (1930, reissue 1978). (Cited hereafter as Hallis.) For briefer

Various factors contributed to the development, on the one hand, of these theories in Germany and France, and the absence, on the other, of any comparable development in England. First, the revolutions in England during the seventeenth century resulted in the emasculation of the power of the Crown and its royal bureaucracy. 'The destruction of the royal bureaucracy in 1640-1 can be regarded as the most decisive single event in the whole of British history.'⁶¹ In many respects the Crown (and executive) became the *agent* of Parliament; with the exception of what remained of the royal prerogative, it lost whatever independent, *inherent* power it might have had.⁶² Even though largely subconscious, the conception of the executive as 'agent' of Parliament has operated to maintain, to an unusual extent, a personalized view of the Crown: 'governments became personified in the "over-life-size" role of ministers'.⁶³ And this attitude has generally suited Englishmen; it accords with their overall approach to law which eschews abstraction and conceptualism: 'the English legal mind does not take so kindly to philosophy as does the French or German.'⁶⁴

Things were and are quite different on the Continent. Ever since the authoritarian Capetian monarchy, the inherent power (*puissance publique*⁶⁵) of government has always been a feature of public rule in France.⁶⁶ The rise of the absolutist monarchy and the French anxiety to assert France's independence from the Holy Roman Empire created a sense of 'stateness' coupled with extensive executive power in the hands of the king. In direct contrast to its English antecedents, the French Revolution did not break this power—it simply transferred it from the king to the 'nation'. The event forced a transition from a patrimonial, personalized concept of the State to a political, abstract notion, and this set the stage for the development in France of matching theories of the State as a legal personality.⁶⁷

In Germany there was the precedent of the powerful Prussian bureaucracy, which created the administrative State (*Verwaltungs- or Polizeistaat*). The massive reception of Roman law introduced more expansive notions of public power than was known in

discussions, see D H van Wyk *Persoonlike Status in die Suid-Afrikaanse Publiekereg* (unpublished LL D thesis University of South Africa 1979) 152-9, and Dyson *passim* and especially Part II.

⁶¹ Christopher Hill *Reformation to Industrial Revolution* (1967) 76, quoted in Otto Kahn-Freund, Claudine Lévy and Bernard Rudden *A Source-book on French Law* 2 ed (1979) 201 (cited hereafter as Kahn-Freund *et al*).

⁶² Cf Dyson 40-1.

⁶³ Dyson 41. Closely allied to this view is the (again implicit) notion that political power is a personalized trust: see Maitland's Introduction to *Political Theories of the Middle Age* xxxvi-xxxvii.

⁶⁴ Hallis *op cit* xxvii.

⁶⁵ On which, see, for example, J Brèthe de la Gressaye '*Droit Administratif et Droit Privé*' (1950), excerpted in Kahn-Freund *et al* *op cit* 221-6; and M Wiechers *Die Systeem van die Administratiefreg* (unpublished LL D thesis University of Pretoria 1965) 56-7.

⁶⁶ M Waline *Droit Administratif* (1961) at the excerpts in Kahn-Freund *et al* 205-6.

⁶⁷ See Dyson 136-8.

English common law; and it assured the central importance of academic (and therefore scholastic) lawyers. With the rise of the Pandectists in the nineteenth century (and their obsession with conceptual analysis) highly abstract theories about the legal nature of the State were bound to be applied to a highly visible executive authority. And legal philosophy was closely integrated with the political philosophies of the Hegelians, who held abstract, meta-physical views of the nature of the political State.⁶⁸

The theoretical developments in France and Germany spanned a whole range of political beliefs, representing a tension between the State as an entity *distinct* from society and the State as the major social entity itself.⁶⁹ In law this was manifested in the division between 'fiction' and 'concession' theories, on the one hand, and the 'realist' and 'organic' theories as to the nature of State personality, on the other.⁷⁰

As can be imagined, England could not seriously get along without *some* notion of a depersonalized governing entity. For instance, in the Middle Ages she faced the bizarre situation that on the death of the king all courts (which received their jurisdiction from him personally) lost their jurisdiction and litigation had to start all over again.⁷¹ During later centuries there was developed the distinction between the king in his natural person and the king in his political person⁷² and, through a borrowing from the ecclesiastical notion of a 'corporation sole' (as opposed to a 'corporation aggregate'),⁷³ it was suggested that the Crown was a corporate entity.⁷⁴ However, English law has never been very consistent about the corporate personality of the Crown,⁷⁵ let alone the State, and, with a few exceptions,⁷⁶ the question has largely been ignored by English lawyers.

SOUTH AFRICA

(a) *The 'State' as a Corporate Entity*

Following in the Westminster tradition, South African lawyers have generally adopted the English approach in their use and

⁶⁸ This necessarily superficial outline is based mainly on the numerous discussions on the subject to be found throughout Hallis and Dyson.

⁶⁹ See, generally, Dyson chs 5 and 6.

⁷⁰ For an excellent and extensive discussion, see Hallis *passim*.

⁷¹ Maitland *op cit* note 12 above at 136.

⁷² On which distinction, see, for instance, Holdsworth *op cit* note 27 above at 202-4.

⁷³ See, generally, F W Maitland 'The Corporation Sole' (1900) 16 *LQR* 335. Maitland describes this notion as 'no "juristic person"; he or it is either natural man or juristic abortion' (idem 354). See also Pollock and Maitland *op cit* note 13 above at 518ff.

⁷⁴ Described and routed by Maitland in 'The Crown as Corporation' (1901) 17 *LQR* 131.

⁷⁵ See Maitland *op cit* previous note *passim*; and Geoffrey Marshall *Constitutional Theory* (1971) ch II (cited hereafter as Marshall).

⁷⁶ Such as, for example, F W Maitland, Geoffrey Marshall, and David M Walker 'The Legal Theory of the State' (1953) 65 *Juridical Review* 255. Walker is, as Marshall puts it (16n6), 'admittedly a Scotsman'.

understanding of terms such as 'the State' and 'the Government' etc. In recent times this has changed somewhat. In the first place, South Africa has become a republic, and so 'the Crown' has dropped out of the picture and 'the State' has replaced it. Secondly, some public lawyers have been heavily influenced by the theories of German lawyers.⁷⁷ Nevertheless, as was pointed out at the beginning of this article, whatever effect these developments may have had on legal theories, our law itself reveals no clear conception of 'the State' or, for that matter, any of the other terms mentioned. In this section I propose to analyse briefly how these terms appear to be *used* in the statutes and cases. In this way a clearer, though still not sharp, picture might emerge. However, I may as well confess at the outset to a substantial degree of scepticism as to the necessity of a coherent legal theory of 'the State' at all. Maitland, in the most elegant fashion, has argued that there ought to be one: 'We cannot get on without the State, or the Nation, or the Commonwealth, or the Public, or some similar entity, and yet that is what we are professing to do',⁷⁸ to which one might reply—perhaps impudently—that in *law* we can because *we are*.

Does this quest for a legal conception of 'the State' as a coherent corporate body not depend upon a fallacy? Does it not suppose that 'the State' can exist in the same or similar way that you or I do? Obviously this begs the very question that a number of the theories as to State personality seek to answer, yet I am much persuaded by Alf Ross's point that the inevitable question 'What is the State?' does not, without question, belong to the field of logical analysis:⁷⁹ it assumes that a *definition* can be provided which will reveal the 'hidden nature or essence of things', whereas, in fact, all we can meaningfully do is provide a *description* of *how* terms such as 'the State' are used in the law. The search for an 'essence' or 'nature' lies in the realm of speculative metaphysics and political philosophy, not law—at least if lawyers want to be taken seriously. Thus it would be a mistake to assume that something called 'the State' does or should exist as a *being*, and that all we need to do is to define it properly. In one respect it does 'exist' in a manner approximating that of human beings, dogs and trees. That is for the purposes of *international law*, 'because the rules of international law have reference (in the first resort) precisely to "States"'.⁸⁰ A 'State', for this purpose, was adequately described by Woodrow Wilson as 'a people organized for law within a definite territory',⁸¹ and such

⁷⁷ For instance, P J van R Henning *Oor die Begrip Diskresie in die Administratiefreg* (unpublished LLD thesis University of South Africa 1967) 81ff; J A van S d'Oliviera *State Liability for the Wrongful Exercise of Discretionary Powers* (unpublished LLD thesis University of South Africa 1976) especially at 23ff; and D H van Wyk op cit note 60 above, especially at 152ff.

⁷⁸ Maitland op cit note 74 above at 136.

⁷⁹ Alf Ross 'On the Concepts "State" and "State Organs" in Constitutional Law' (1961) 5 *Scandinavian Studies in Law* 111 at 113.

⁸⁰ *Idem* 114.

⁸¹ Quoted in C F Strong *Modern Political Constitutions* 8 revised (by M G Clarke) (1972) 5.

'entities' are, in international law, entitled to become members of the United Nations,⁸² have a vote there,⁸³ and so on. But apart from the relationships *between* States or 'countries' in international law, in municipal law—*within* the State—there is no logical necessity for 'the State' to have a corporate personality at all. It may well be that a statute says that 'it' does have, and if the statute does, then that is the law; but nothing *inherently* follows from this fact. The only 'things' that follow are those stipulated by the law itself. What is important is that the law *attributes* certain *actions* to 'the State', designates certain people as *employees* of 'the State', stipulates certain persons or corporate bodies as *organs* of 'the State', etc. None of this means any more than that 'the State' exists as a legal word, and even, if this is what the law says, a legal institution or juristic *persona* for certain purposes. Certain legal consequences flow from its application as a legal word under certain circumstances as stipulated by the law. *No* consequences flow *inherently* or *naturally* from the fact that 'the State' exists as a legal word, institution or entity.⁸⁴

All this is nothing new.⁸⁵ Yet it is easily forgotten. So, for instance, South African cases⁸⁶ have been criticized⁸⁷ for holding that 'the Government' (that is, Executive Council) is itself a legal *persona* for certain purposes on the ground that this 'is difficult to reconcile with the acceptance of the juristic personality of the State'.⁸⁸ It is only difficult to reconcile if: (a) there is a rule of law relating to 'the State' which conflicts with such recognition (and in these cases there was not); or (b) one's concept of the 'juristic personality of the State' is a dogmatic one which denies such a possibility. Although D'Oliviera seems to accept that these decisions are really only 'awkward', it appears that he subscribes to a dogmatic concept of State personality, because he talks about the 'inherent unity' of the State,⁸⁹ and this, as I have tried to show, does not automatically follow from the fact that 'the State' 'exists'. If the decisions upset that 'inherent unity' of his concept, then there is something wrong with the concept, for it does not describe the law. To suggest otherwise is to get matters the wrong way around and to indulge in 'sterile conceptualism'. (Of course, the law may be *undesirable* and perhaps it ought to be changed, but that is another argument altogether.) In this regard Schreiner JA, in the

⁸² Charter of the United Nations art 4. ⁸³ *Idem* art 18.

⁸⁴ Cf the analysis by H L A Hart *The Concept of Law* (1961) 218–20.

⁸⁵ See, for example, the discussion of Jellinek and Kelsen by Ross op cit note 79 above at 125–9.

⁸⁶ For example, *Die Spoorbond v South African Railways* 1946 AD 999 and *Die Regering van die Republiek van Suid-Afrika v SANTAM Versekeringsmaatskappy Bpk* 1964 (1) SA 546 (W).

⁸⁷ By J P verLoren van Themaat 'Die Wet op Staatsaanspreeklikheid' (1957) 20 *THRHR* 245; Marinus Wiechers 'Die Regering van die Republiek 'n Regspersoon?' (1964) 27 *THRHR* 161 and *Administratiefreg* (1973) 68; Henning op cit note 77 above at 99–101; and D'Oliviera op cit note 77 above at 24–5.

⁸⁸ D'Oliviera op cit 25.

⁸⁹ *Idem* 25n41.

Spoorbond case, wisely warned against the unjustified reasoning by analogy from other concepts or deducing from present concepts what is not there.⁹⁰

Nevertheless, the influence of the South African conceptualists appears to be growing. For instance, the new South African Transport Services Act⁹¹ states, in s 3(1):

'The South African Transport Services is not a separate legal person but is a commercial enterprise of the State.'

Although no assistance is to be derived from Hansard, it seems clear that this subsection is a product of the 'inherent unity' notion of the State. Yet theoretical symmetry soon gives way to practical reality when, in s 3(2) of the same Act, we learn that

'[n]otwithstanding anything to the contrary in the State Liability Act . . . , all legal proceedings to which the South African Transport Services is a party, shall be brought by or against the South African Transport Services in the name of "the South African Transport Services" . . . ,

and that s 9(2) stipulates that, under certain circumstances only, 'the State' shall be exempted from restrictions placed by the Transport Services upon the alienation of immovable property! All this simply goes to show, not that any immutable axiom of law has been broken, but that the attributes of 'the State' are whatever the lawmakers say they are.

(b) *The Concept of the 'State' in Practice*

If 'the State' is no more than what the law wants it to be, why do we bother about it at all? The reasons are complex: first, as a matter of fact the law makes frequent reference to 'the State', and so, to this extent, it 'exists' and the law must be made sense of. Secondly, some statutes refer laconically to 'the State', as does, for example, the State Liability Act.⁹² In such cases it becomes necessary to determine, as a matter of interpretation, on what occasions the statute intends actions to be *attributed* to 'the State' for the purposes of the Act. Thirdly, it has become customary to regard constitutional and administrative law as the law referring to 'the State', and it is necessary to explain what we include under that circumscription.

⁹⁰ *Die Spoorbond v South African Railways* 1946 AD 999 at 1011-12: '. . . it seems to me to be clear that great care should be exercised in arguing by analogy from the rights of one person to the rights of another whose qualities are not identical with those of the first. It is no doubt convenient for certain purposes to treat the Crown as a corporation or artificial person. But it is obviously a very different kind of person from the rest of the persons, natural and artificial, that make up the community. In many respects its relationship to those other persons is unique and there is no reason in common sense or logic for concluding that wherever a subject would have a right of action there the Crown must have one too. . . . While the law does at times generalize it does so with caution; as frequently, it prefers to act selectively according to the requirements of the particular situation.' Cf *South African Associated Newspapers Ltd v Estate Pelser* 1975 (4) SA 797 (A) at 806, where it was accepted that the 'Government' is a 'body *sui generis*'.

⁹¹ Act 65 of 1981.

⁹² Act 20 of 1957.

(i) 'The State' and 'the Republic'

There is no doubt that 'the State' 'exists' in law. Our Constitution Act says so in many of its provisions.⁹³ All the references are by *implication*, but the implication is there: we have, since the Republic came into being, a 'State President' who is 'head of the State', and the 'State' has 'assets or rights' and, now, a 'State Revenue Fund'. Certain persons are employed in the 'service of the State' and there are 'departments of State'.⁹⁴ But the term 'State' is not used with any consistency. Sometimes, in a clumsy attempt to obliterate all vestiges of the old 'Crown', the 'State' is equated with the 'Republic'.⁹⁵ For the purposes of international law this makes sense: every 'State' has a name and ours is the 'Republic of South Africa'. But it is surely unnecessarily confusing to continue using the term 'Republic' for internal purposes. Section 7 of the Constitution Act vacillates in describing the State President in the marginal note as 'the head of the State', and in the operative part as 'the head of the Republic', and, finally, again as 'head of the State'. Section 20 speaks of 'departments of State of the Republic', which, if one refers to s 3(a), where it is stated that any reference to 'the State shall be construed as a reference to the Republic', means 'departments of the Republic of the Republic'! What this confusion illustrates is that it was unnecessary to equate 'the State' with 'the Republic'. We had a 'State' long before a 'Republic'.⁹⁶ The equation leads to further schizophrenia: s 55(d) refers to 'any office of profit under the Republic', yet s 116(4) states that '[a]ny person who holds an office in the service of the State' may be required to 'take an oath or solemn affirmation that he will be faithful to the Republic'. Section 96 speaks of 'assets or rights belonging to the State', yet s 97 refers to 'revenues of the Republic' and is followed by s 98, which establishes a 'State Revenue Fund'.

All this could have been avoided by not equating, in s 3(a), the 'State' with the 'Republic'. After all, just because the Republic of South Africa is a legal entity (as was the Union of South Africa before it⁹⁷), this does not mean that in every respect it and 'the

⁹³ For example, ss 3(a), 7, 20(1) and (6), 96, 98, 116(4).

⁹⁴ Likewise, the State Liability Act 20 of 1957 says that 'the State' may be sued and will be liable as if it were 'a person' (s 1); and the State Land Disposal Act 48 of 1961 refers to 'any person (including the State)' (s 2(B)).

⁹⁵ Constitution Act s 3(a) and (b). See, too, the Criminal Procedure Act 51 of 1977 s 2.

⁹⁶ Section 14 of the South Africa Act 1909 provided for 'departments of State of the Union' and 'Ministers of State for the Union'. In 1957 the 'Government Attorney' became the 'State Attorney' (State Attorney Act 56 of 1957) and the 'Crown' Liabilities Act (Act 1 of 1910) became the 'State' Liability Act (Act 20 of 1957). See, too, the words of McGregor J in *Ex parte Van der Merwe: In re Havenga's Election* 1916 OPD 26 at 38.

⁹⁷ See, for instance, H R Hahlo and Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 170. By a similar process of reasoning it could be argued that the 'United Kingdom' and 'Great Britain' 'exist' as legal entities (see the Union with Scotland Act 1707 art 1)—something often overlooked by those (like VerLoren van Themaat (note 87 above)) who thought that the 'Union of South Africa' was, in this respect, different from the 'United Kingdom'. See, too, *Die Regering van die Republiek van Suid-Afrika v SANTAM Versekeringsmaatskappy Bpk* 1964 (1) SA 546 (W) at 549.

State' are the same thing. One is the *name* of the other, and it also sometimes demarcates a *territory*,⁹⁸ whereas 'the State', on the other hand, often seems to refer to the *management* of 'the Republic'⁹⁹ and sometimes to its *property*.¹⁰⁰ Would it not have been simpler to use the term 'State' instead of 'Republic' except where some sort of external identity is required, as, for example, in the title of the Act, in s 1 (where the Republic of South Africa is constituted), and wherever it is needed to contrast 'the Republic' with its predecessor, 'the Union'?¹⁰¹

It seems that the sense of this is appreciated elsewhere. We do not have a 'Republic Liability Act' or a 'Republic Tender Board'. The use of the term 'State' in such statutes refers sometimes to the 'management' of the Republic, and sometimes to its 'property' or 'estate'; and the word 'State' seems familiar and correct, even if it confounds the metaphysicists by perpetuating a dichotomy between Republic and State.

In summary, one may say that, as a rough description, 'the State' appears to be used as a collective noun for:

- (a) the collective wealth¹⁰² ('estate') and liabilities¹⁰³ of the sovereign territory known as the 'Republic of South Africa' which are not owned or owed by private individuals or corporations;¹⁰⁴ and
- (b) the conglomeration of organs, instruments and institutions¹⁰⁵ which have as their common purpose the 'manage-

⁹⁸ Cf note 7 above.

⁹⁹ As the term was in fact used by Machiavelli (see 217f above).

¹⁰⁰ As the term was used before Machiavelli (see 217 above).

¹⁰¹ Just as it was necessary to call a Union Act the 'Republican' Officials' and other Persons' Pension Act (Act 49 of 1926), because it referred to officials of the old South African Republic. (Now repealed by the General Pensions Act 29 of 1979.)

¹⁰² It would seem that, although s 112 of the Constitution Act speaks of 'rights and obligations of the Republic', the context of the section as a whole (dealing with treaties, conventions etc) indicates that 'the Republic' is used because of the *external* relations involved; for *internal* purposes 'the State' would be a satisfactory substitute. Thus s 96 of the Constitution Act refers to 'assets or rights belonging to the State'; the State Land Disposal Act 48 of 1961 deals with 'State land', which is defined to include 'any right in respect of State land'; and the Expropriation Act 63 of 1975 s 2(2) envisages the acquisition of 'property on behalf of the State', while s 8(1) provides that ownership in expropriated property 'vests in the State'.

¹⁰³ Various synonyms have been used to describe the revenues and liabilities of 'the State'. *Revenues* are sometimes called 'revenues of the Republic', sometimes 'revenues of the State'. Although only one of the various 'Revenue Funds' is officially called the 'State Revenue Fund', all are, in a sense, 'State revenues'. (Cf the definition of 'State moneys' in s 1(v) of the Advocate-General Act 118 of 1979, which is much wider than the definition of 'State moneys' contained in s 1 of the Exchequer and Audit Act 66 of 1975. This once again illustrates that such terms need not have any existence independent of the statutes themselves, which is what conceptualists might be driven to argue.) *Liabilities*, on the other hand, are confused by the use of the term 'Public Debt Commissioners' (Public Debt Commissioners Act 2 of 1969), who seem more concerned with 'public' investments, and the term 'State debt' (Exchequer and Audit Act 1975 s 1), which relates to 'public' debts. The term 'Public Debt' seems out of context and confusing; perhaps it ought to be changed. We should make a clearer distinction between debts owed by 'the State' and debts owed to 'the State'.

¹⁰⁴ In this regard 'public property' would be a much wider notion than the Romanistic notion of *res publicae*, which would be no more than a species of the former.

¹⁰⁵ In the light of the tremendous diversity of entities which operate in the 'public' interest and which could therefore be considered to be part of 'the State', one cannot be more specific than this. For practical legal purposes it usually does not matter, since much will depend on

ment'¹⁰⁶ of the public affairs, in the public interest,¹⁰⁷ of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African 'Government'.

This description can never be anything more than a rough guide. No legal consequences flow from it at all except that the activities of the entities referred to under (b) are often, but not always, considered to be activities of 'the State', for example, when consideration is given to the question of 'State' liability under the State Liability Act. In this regard the suggestion by D'Oliviera¹⁰⁸ that acts of such entities be treated as the State's *own* acts seems to me to be eminently well-grounded and ought to be supported. It makes sense, because such acts would be *ascribed* to 'the State' even though there is no tangible entity called 'the State'. However, I must beg to differ with D'Oliviera where he assumes that the basis for his suggestion is that 'the State', unlike private individuals, has '*inherent characteristics*', which he calls the '*puissance publique*'.¹⁰⁹ In fact the *puissance publique*, which is a very important aspect of French public law,¹¹⁰ has, at least since the British occupation at the Cape, never been a part of our law, and it is historically and structurally alien to it. Under our system of constitutional and administrative law, 'the State' has no inherent powers unless one uses the term very loosely to include those powers possessed at common law by way of the prerogative and those liberties which 'State' bodies and officials might, like any individual, enjoy—something fundamentally different from the *puissance publique*. For the same reason I would have to differ with Ross where he would ascribe to 'the State' only acts of 'public authority' (heteronomous, as opposed to autonomous, acts in which 'the State' is in a position of superiority over other parties who are affected).¹¹¹ Apart from the fact that the attempt to make use of such a conceptual key drives Ross to make all sorts of artificial distinctions between acts which are attributed to 'the State' and acts which are performed 'on behalf of the "public treasury"', that approach leads us to the fiction of treating things such as

the construction of the particular statutes concerned, and where common law (for example, the presumptions of judicial review) is concerned, the principles relating to 'public' and 'private' bodies are similar in many respects.

¹⁰⁶ The term 'management' is used in an attempt to get away from the 'executive' connotations pertaining to the term 'government' (see 227 below).

¹⁰⁷ It is interesting to note that s 1 of the Expropriation Act 63 of 1975 equates 'any purpose' of any 'organ of State' with the 'public purpose'.

¹⁰⁸ *State Liability for the Wrongful Exercise of Discretionary Powers* (op cit note 77 above) 477ff. These suggestions were considered favourably by Corbett JA in *Mhlongo and another NO v Minister of Police* 1978 (2) SA 551 (A) at 566-7.

¹⁰⁹ D'Oliviera op cit 478.

¹¹⁰ On which, see 219 and note 65 above. The *functional* distinctions which the concept implies may well be of use, especially in so far as prerogative powers are concerned, in systems based upon common-law judicial review. See Carol Harlow 'The Crown, Wrong Once Again?' (1977) 40 *Modern LR* 728.

¹¹¹ Ross op cit note 79 above at 116ff. Cf Marinus Wiechers *Administratiefreg* 47-9.

'State' contracts as if they were no different from 'private' contracts, when in fact they are different in many legal and factual respects.

(ii) '*The State*' and '*the Government*'

If 'the State' exists in our legislation, so does 'the Government' (or 'government'). The draftsman of the Constitution Act could not resist using the term.¹¹² There is a 'Government' Service Pensions Act.¹¹³ The State President, who is 'the head of the Republic' and 'the head of State', is also 'the head of the executive government'.¹¹⁴ Ministers 'of the Republic' also represent 'the Government of the Republic'.¹¹⁵ And the 'Government' has a seat (in Pretoria).¹¹⁶

It is not clear exactly how much of the activities of 'the State' 'the Government' or 'government' refers to. In s 23 of the Constitution Act 'Government' appears to be applied to both the executive and legislative activities of 'the State',¹¹⁷ and s 93 in speaking of 'provincial government' appears to do the same in respect of the provinces. However, for the most part it seems that the term is generally confined to the *executive* branch of 'government' and, in many instances,¹¹⁸ it replaces the former terms 'the Crown' and 'Governor-General-in-Council'.¹¹⁹ It may be that, in ordinary usage, we still tend to make a subconscious distinction between the *policy-making* functions of 'government'—to which we attach the label 'government', and the *law-implementing* functions—to which we attach the term 'executive',¹²⁰ the former being subject to the control of Parliament, and the latter to the control of the courts.¹²¹

In many respects 'the government' (that is, *executive* government) is much more interesting than 'the State', because here we are dealing with the tangible machinery of 'the State'; and, perhaps because of this, the law has been much more consistent. Nevertheless, its meaning is still very uncertain. Here I shall examine: (1) the extent to which 'the Government' is treated by the law as a single, legal *persona*; (2) how far 'the Government' extends; and (3) the

¹¹² In ss 16, 19, 23, 61, 108(2) and 116. ¹¹³ Act 57 of 1973.

¹¹⁴ Constitution Act s 19. ¹¹⁵ *Idem* s 116(2).

¹¹⁶ *Idem* s 23. Numerous other statutes use 'the Government' as an official designation. For a few examples, see the Black Authorities Act 68 of 1951 s 4(1)(c); the State Liability Act 20 of 1957; the Post Office Act 44 of 1958; the Promotion of Black Self-government Act 46 of 1959 s 3; and the Transkei Constitution Act 48 of 1963 s 22.

¹¹⁷ Section 23 reads: 'Save as is otherwise provided in section *twenty-seven* [which states that the seat of the legislature shall be in Cape Town], Pretoria shall be the seat of Government of the Republic.' At lower levels, the term 'government' is applied to all functions (for example, s 93: 'provincial government'; the Black Authorities Act 68 of 1951 s 3(1): 'tribal or community government').

¹¹⁸ But cf the Constitution Act s 3(b) and (c).

¹¹⁹ Cf *South African Associated Newspapers Ltd v Estate Pelser* 1975 (4) SA 797 (A) at 805F-G.

¹²⁰ Cf 215 above, and Vile 231: 'The "executive" must act according to the law, the "government" must exercise leadership in the development of policy.'

¹²¹ Cf Vile *ibid*.

extent to which 'the Government' is, in our law, identified with 'the State'.

(1) *The Government as a single, legal persona*

Until 1934 the 'Executive Government' of the Union was formally vested in 'the King', and was administered 'by His Majesty in person or by a Governor-General as his representative'.¹²² Thus it was appropriate to equate the 'Executive Government' with the 'Crown', and therefore important to have a 'Crown Liabilities Act'.¹²³ In 1934, giving effect to a convention which had already developed, the Status of the Union Act¹²⁴ repealed the provisions of s 8 of the South Africa Act, and provided that the 'Executive Government' in relation to domestic affairs was vested in the King acting on the advice of his Union Ministers.¹²⁵ As a result, 'the Crown' came to mean either the 'King-in-Council' or the 'Governor-General-in-Council'.¹²⁶ Thus 'Crown', 'Government', 'Governor-General-in-Council' etc were used as interchangeable terms.

Furthermore, it was natural to treat 'the Government', being 'the Crown' in South Africa, as if it were a corporate entity:¹²⁷

'The Governor-General-in-Council (whom I shall call the Crown and who is also sometimes referred to as the Government of the Union) is regarded in law as a legal *persona*, with a perennial existence, and as such, a legal *persona* distinct from the individual human beings or group of persons who from time to time hold office as Governor-General and as members of the Executive Council, just as the King or the Crown in England is regarded as a corporation sole with a perpetual existence, and, as such, distinct from His Majesty the King.'

Recognition of 'the Government' as a legal *persona* was possible and made sense because it was personified by known individuals and institutions who *physically* carried out the executive functions of government for the Union. But this recognition attributed no metaphysical 'personality' to 'the Government': in fact the court in the *Spoorbond* case was anxious to prevent such deductions. Chief Justice Watermeyer emphasized that the Crown was 'only a legal conception and takes no part in the management of the Railways',¹²⁸ and that any new consequences resulting from the fact that the Crown was recognized as a legal *persona* would constitute an *extension* of existing law, *not a deduction* from *a priori* concepts.¹²⁹ Schreiner JA, concurring, insisted that the fact that it was 'convenient for certain purposes to treat the Crown as a corporation or artificial person' did not warrant the further conclusion that it should automatically be treated in the same way as *other* artificial

¹²² South Africa Act 1909 s 8.

¹²³ Act 1 of 1910.

¹²⁴ Act 69 of 1934 s 11(1).

¹²⁵ *Idem* s 4.

¹²⁶ See, for example, *Swarts v Minister of Justice* 1941 AD 181 at 186-7; *Die Spoorbond v South African Railways* 1946 AD 999 at 1005. Cf *R v Jones* 1962 (3) SA 1 (FC) at 16.

¹²⁷ *Die Spoorbond* (above) at 1005 (per Watermeyer CJ).

¹²⁸ *Idem* at 1009.

¹²⁹ *Idem* at 1008.

persons—something which would otherwise have followed if there was anything *inherent* in the concept of corporate personality.¹³⁰

In one respect, however, it might be said that metaphysics entered judicial treatment of 'the Government'. Some cases have held or suggested that 'the Crown' ('the Government') cannot sue 'itself'. For instance, when the Natal Provincial Administration attempted to sue the South African Railways, the former's claim was dismissed on exception on the basis that, as the province was a department of the Crown, it could not sue another department (viz the Railways), since this would involve the Crown's suing itself.¹³¹ But to talk of 'the Crown' suing 'itself' is to assume the dogma of indivisibility of 'the Crown', which is itself linked to the dogma of indivisible sovereignty—all reminiscent of the judicial attempts to grapple with these notions in federal countries.¹³² While such a view of 'the Crown' is probably correct in law, given the English approach, there is nothing *inherently* or *logically* necessary about this approach.¹³³ In fact it has only led to a lot of unnecessary trouble in the case of maxims such as 'the Crown can do no wrong'. The *Natal Provincial Administration* case was probably really decided on the policy issues which militate against claims between departments of the Crown being adjudicated in the courts.¹³⁴ In any event, that such conceptual symmetry cannot be maintained in practice is demonstrated by the case of *South African Railways v Kemp*,¹³⁵ where a man who had been sued by the South African Railways had attempted to raise by way of a counterclaim a dispute that he had with the Department of Defence. In that case the Transvaal Court refused to treat 'the Government' as one and the same person for the purposes of counterclaims. Although the court accepted that the Railways was, since Union, no longer itself a body corporate, and that it was certainly a part of the 'Government',¹³⁶ the court

¹³⁰ See Schreiner JA at 1011–12 (partially quoted in note 90 above).

¹³¹ *Natal Provincial Administration v South African Railways and Harbours* 1936 NPd 643. Cf *South African Railways v Registrar of Deeds (Natal)* (1919) 40 NLR 66 at 67.

¹³² See, for example, the discussions in *R v Jones* 1962 (1) SA 503 (SR), 1962 (3) SA 1 (FC).

¹³³ See Marshall 33.

¹³⁴ The fact that the 'same money' was involved (Provincial Revenue Fund money, which came largely from the Consolidated Revenue Fund) seemed to make the dispute between the two departments incongruous (see the *Natal Provincial Administration* case (note 131 above) at 654–62, 664). Indeed, the court accepted that for other purposes the Provincial Administration could be treated as distinct and capable of having a claim against 'the King in His government of the Union' (at 651; and cf *Union Government v Transvaal Provincial Administration* 1918 TPD 169). The Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, which limits the time within which actions may be instituted against provincial administrations, appears to provide for the possibility of litigation between provincial administrations and the State by providing, in s 6, that 'This Act shall bind the State'.

¹³⁵ 1916 TPD 174.

¹³⁶ That the South African Railways and Harbours (now the South African Transport Services) was undoubtedly a part of 'the Crown' and that it could represent 'the Government of the Union' for certain purposes was confirmed in *Winter v South African Railways and Harbours* 1929 AD 100. The position is now regulated by s 3(1) of the South African Transport Services Act 65 of 1981 (quoted 223 above). But a dichotomy between 'the State' and the South African Transport Services is still evident: see, for example, ss 3(2), 9(2) and 9(4).

refused to regard it as the same 'person' for the purposes of counterclaims. Stress was laid on the fact that it had its own Railway Fund¹³⁷ and that it was treated separately by statute.¹³⁸ Although the decision would not please conceptualists much, it was in fact the only sensible conclusion to which the court could come. To pretend that because the Railways was as much a part of 'the Government' as the Department of Defence (and thus liable financially and managerially to meet the latter's obligations and account for its acts) would be to stretch the myth of corporate personality with regard to 'the Government' to the realm of sheer nonsense.

To conclude, then, it seems that, like 'the State', 'the Government' is a legal entity for some purposes¹³⁹ but, particularly in the case of financial matters, not others.¹⁴⁰ The actions of departments and officers very different from one another are attributed to 'the Government' without there being any necessary *system* to the conglomeration of rules that operate. Nor, it is suggested, could a realistic system be imposed given the wide diversity of activities upon which 'the Government' embarks.

(2) *How far does 'the Government' extend?*

'The Government' describes not only the executive functionaries of *central* government. It would be misleading to suggest that all the 'departments of State', for whom members of the Executive Council ('the Government') are responsible, constitute 'the Government': first, because they are not all called 'departments',¹⁴¹ and secondly, because 'the Government' extends to the provincial governments, as is clear from numerous cases in which this has been emphasized.¹⁴²

¹³⁷ 1916 TPD 174 at 177 (De Villiers JP). ¹³⁸ *Idem* at 179 (Mason J).

¹³⁹ There is no question that 'the Government' has *locus standi* to sue and that it does sue under this title: see, for example, *Marais v Government of the Union of South Africa* 1911 TPD 127; *Ex parte the Government* 1914 TPD 596; *Government of the Republic of South Africa v Motsuenyane* 1963 (2) SA 484 (T); *The Government v Regna-Adwel Business Machines Africa (Pty) Ltd* 1970 (2) SA 428 (T); *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A); *The Government v Thorne and another* NNO 1974 (2) SA 1 (A); and *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A).

¹⁴⁰ The South African Transport Services (old Railways and Harbours Administration) and Post Office have their own Revenue Funds, distinct from the 'State Revenue Fund' (the Railways and Harbours Finances and Accounts Act 48 of 1977 s 2; and the Post Office Act 44 of 1958 s 12D). The South African Transport Services can purchase, expropriate and own property in its own name (the South African Transport Services Act 65 of 1981 s 9(1); the Expropriation Act 63 of 1975 s 4). And, of course, numerous other legal differences relating to these and many other 'organs' of 'the Government' could be listed. To attempt to construct around them a theory of corporate personality of 'the Government', let alone 'the State', would prove a hopeless (and worthless) task.

¹⁴¹ See the diverse list of titles in the First Schedule to the Public Service Act 54 of 1957.

¹⁴² See *Ex parte Van der Merwe: In re Havenga's Election* 1916 OPD 26; *South African Railways v Registrar of Deeds (Natal)* (1919) 40 NLR 66; *Natal Provincial Administration v South African Railways and Harbours* 1936 NPD 643; *Pretoria City Council v Lombard* NO 1949 (1) SA 166 (T) at 176; *S v Tromp* 1966 (1) SA 646 (N) at 654; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260-1; and *Theron v Hylton-Smith* 1978 (2) SA 294 (N) at 296. Note also that the provincial administrations are treated as part of the 'public service' by the Public Service Act 54 of 1957.

Perhaps one could say that when statutes confer powers on 'the Government', this refers to the State President acting on the advice of the Executive Council,¹⁴³ or 'the Cabinet'. And, when Parliament deems it fit to confer powers and duties on a specifically named department or other body, if it is either one of the 'departments' of the 'public service' (including the provincial administrations) or the South African Transport Services or Post Office, one is concerned with 'the Government' in a loose sense. If it ever became legally important to determine whether 'the Government' also includes any of the plethora of extra-departmental statutory bodies, this would have to be resolved by the construction of the statute concerned.¹⁴⁴ Nothing could be deduced from the concept of 'the Government' itself.

(3) Does 'the Government' = 'the State'?

Conceptualists have argued that 'the State' has become the all-embracing corporate entity in South Africa and that it acts through its 'organs', some of which might be parts of the old 'Crown' or 'Government'.¹⁴⁵ In other words, 'the Crown' or 'the Government' and various other institutions have been absorbed by the concept of 'the State' and no longer have any independent life of their own. The influence of these views is undoubtedly apparent in the wording of various pieces of legislation. It was the motivation for changing the name of the 'Crown' Liability Act to the 'State' Liability Act¹⁴⁶ and for equating 'the Crown', not with 'the Government', but with 'the Republic or the State President' in the Constitution Act; and it accounts for the interesting difference of wording in the long titles of the Indemnity Acts of 1961 and 1977.¹⁴⁷

Nevertheless, despite the criticism of these authors, the courts have not experienced difficulty in maintaining, on the one hand, that 'the Government' is a legal *persona* and, on the other, that 'the Government' is 'the State' for certain purposes. And it seems to me, with respect, that they have approached the issue in a sensible way. The approach adopted was formulated by Vieyra J in *Die Regering van die Republiek van Suid-Afrika v SANTAM Versekeringsmaatskappy Bpk*,¹⁴⁸ in which exception had been taken to a claim

¹⁴³ Constitution Act s 16(1) and (2).

¹⁴⁴ Various criteria would have to be canvassed, such as the source of finance for the activities concerned, who is ultimately responsible for them, etc. (Cf the approach of the court in *In re Havenga's Election* 1916 OPD 26, especially at 36ff).

¹⁴⁵ See the authors cited in note 87 above.

¹⁴⁶ See VerLoren van Themaat op cit note 87 above.

¹⁴⁷ The long titles of Acts 61 of 1961 and 13 of 1977 read, respectively: 'Act to indemnify the Government, its officers and all other persons acting under its or their authority . . .' and 'Act to indemnify the State, members of the Executive Council of the Republic, persons in the service of the State and persons acting under their authority . ..'. Cf also their respective ss 1(1).

¹⁴⁸ 1964 (1) SA 546 (W).

launched in the name of 'die Regering' on the ground that 'die Regering', as opposed to 'the State' or 'the Republic of South Africa', did not have *locus standi*. It was argued by the excipients that, while 'the Government' might have existed as a legal *persona* and as 'the Crown' until 1957, once the 'State' Liability Act replaced the 'Crown' Liability Act 'the Government' lost its *locus standi*, because a newly-formed 'State' had absorbed it, and it was, henceforth, no more than an 'organ' of 'the State'. This argument was rejected; the court pointed out that the change in wording was to give effect to South Africa's 'nationhood' and 'sovereign' independence, removing the connotations of subservience which had attached to the use of the term 'Crown' in South Africa.¹⁴⁹ The suggestion that one should draw analogies between companies and their boards, on the one hand, and 'the State' and its 'Government', on the other, was thought to be 'incorrect', even though this might give rise to an apparent anomaly. In terms which appropriately express the way in which we *ascribe* acts to 'the State', Vieyra J said:¹⁵⁰

'... the State has many facets, executive, legislative and judicial, and accordingly where rights and duties arise similar to those of the ordinary juristic person, natural or otherwise, it is expedient that the Government, ie the executive power, should be considered as the embodiment of the State's position in such regard.'

Shortly afterwards Caney J, in *S v Tromp*, used terms which express a similar approach:¹⁵¹

'It is clear that the State has many Departments or, as they have frequently been styled, *manifestations*. Thus it has been held that the South African Railways and Harbours is a Department of the State . . . as is a Provincial Administration. . . .'

Terms such as 'organ' or 'agent' are used to express *metaphorically* the fact that we *ascribe* certain acts to 'the State', even though no such thing exists in a physical sense. It is only failure to appreciate this that leads to the temptation to reason by analogy and to reject the notion of a 'corporation within a corporation'. If one were to take the view that 'the Government' cannot, if it represents 'the State', be a corporation itself, then one must also argue that the provincial administrations, the State Tender Board etc, all of which represent 'the State', do not have 'corporate' features such as *locus standi in judicio* themselves, and this is, of course, absurd.

The fact that we *ascribe* acts of certain officials or organs to 'the State' explains why for some purposes those officials or organs *are* 'the State'.¹⁵² This does not mean that nothing else can be 'the State'

¹⁴⁹ *Idem* at 549.

¹⁵⁰ *Idem* at 548.

¹⁵¹ 1966 (1) SA 646 (N) at 654 (my emphasis).

¹⁵² Cf *S v De Bruin* 1975 (3) SA 56 (T), where the court, dealing with precedents on the question of whether statutes bind the State, remarked: 'Met "the Crown" word in die verband eenvoudig bedoel: "die Staat"' (at 58F); and cf the court's equation of the 'servants' of the State with 'the State' at 62-6. In *South African Associated Newspapers Ltd v Estate Pelser* 1975 (4) SA

on another occasion and in different circumstances. It also explains why sometimes, when we are forced to find a 'Crown-substitute' for the purposes of the crime of treason etc, we have to resort to that 'manifestation' of 'the State' which has features closest to those of a natural person: that is, 'the Government'. This the courts were obliged to do in *R v Leibbrandt*¹⁵³ and *R v Neumann*¹⁵⁴ despite the fact that in *Leibbrandt* Watermeyer CJ had earlier furnished a metaphysical conception of 'the State'.¹⁵⁵

(iii) 'National'

It is not uncommon for the legislature to refer to the statutory bodies or institutions which it creates as 'national'. Thus in the Constitution Act we have a 'National' Flag and 'National' Anthem,¹⁵⁶ there are bodies such as the 'National' Transport Commission,¹⁵⁷ and we have 'national' monuments.¹⁵⁸

While the term 'national' has a great deal of significance in the realm of public international law, especially when used in distinction to 'citizenship',¹⁵⁹ it seems that it has relatively little legal significance in municipal law. The use of the term in South Africa, except in relation to matters of citizenship, seems to be for three purposes. First, it is used to express the central, nation-wide feature or jurisdiction of the body concerned. Thus the National Transport Commission, the National Health Policy Council¹⁶⁰ and the National Air Pollution Advisory Committee,¹⁶¹ to mention a few examples, are concerned with the *whole* of the Republic and consequently operate from the central level of government. Perhaps they could just as easily be called the 'South African Transport Commission' etc, like the 'South African Medical Research Council',¹⁶² but the 'State Transport Commission' would not have expressed quite the same meaning.

797 (A) the Appellate Division accepted that 'the Government in its executive branch is a body *sui generis*' and that, in 'its executive functions, the Government (and thus the Executive Council) represents the State, and is *wholly identified with it*' (at 806E, my emphasis). Rose Innes treats 'the Government' and 'the State' as the same thing (L A Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 228).

¹⁵³ 1944 AD 253 at 281: 'For the purposes of the law of treason the Government is wholly identified with the State . . .' (per Watermeyer CJ, quoting with approval the judgment of Schreiner J in the Special Court below).

¹⁵⁴ 1949 (3) SA 1238 (Special Criminal Court, Transvaal) at 1259-61. Cf *SANTAM* (note 148 above) at 548; *Madzimbamuto v Lardner-Burke* NO 1968 (2) SA 284 (RAD) at 366-7; and *Estate Pelsler* (note 152 above) at 806.

¹⁵⁵ 1944 AD 253 at 279: 'The State against which the hostile intent must exist is, of course, the people of the Union of South Africa organized as a State, of which the King, under the South Africa Act, is the head.'

¹⁵⁶ Sections 4 and 6 respectively. ¹⁵⁷ Transport (Co-ordination) Act 44 of 1948 s 3.

¹⁵⁸ National Monuments Act 28 of 1969.

¹⁵⁹ See, for example, John Dugard 'South Africa's "Independent" Homelands: An Exercise in Denationalization' (1980) 10 *Denver J of International Law and Policy* 11 at 21-2 (and the works there cited).

¹⁶⁰ Health Act 63 of 1977 s 10.

¹⁶¹ Atmospheric Pollution Prevention Act 45 of 1965 s 2.

¹⁶² South African Medical Research Council Act 16 of 1969.

Secondly, the term is used to indicate more clearly than would the term 'State', that the thing in question is 'for the people' or 'the nation'. It would be here that national monuments fit in.

National flags and anthems seem to straddle the second usage and a third, which is where the term is used to demarcate one 'nation' from another. This last use of the term not only begins to shade into international law by definition, but it has become highly ambiguous since the rise of the 'nation State'. Thus one can confuse two criteria for determining what is meant by 'nation'. On the one hand, if one is talking about 'nationals of a State' then the independence of the State is all important.¹⁶³ But if one is referring to nations *within* a State—the favourite South African game—then one may be referring to groups which 'form separate National units on the basis of language and culture';¹⁶⁴ and only in this way can one make legal sense of the ultimate *political* absurdity of a National States Constitution Act,¹⁶⁵ which refers to 'States' within a 'State'.

(iv) '*Administration*'

'Administration' is one of the most notoriously ambiguous terms in public law. It has not only acquired new connotations during its historical evolution,¹⁶⁶ but it is a term that carries a multitude of meanings in contemporary usage, and it is used in both public and private affairs. As a term of art it would not really matter how it was used but for the fact that the most generally accepted 'definition' of administrative law is Jennings's laconic tautology: 'Administrative law is the law relating to the Administration.'¹⁶⁷ Thus what the 'administration' *is* is a question vital to the definition of administrative law.¹⁶⁸

The first difficulty comes with the way in which the term is used in the realm of public affairs. It is sometimes used, with a capital 'A', to refer to a specific Cabinet (that is, Executive Council), as distinct from its wider use, with a small 'a', to describe the whole 'public administration'.¹⁶⁹ But, as we have just seen, Jennings uses a capital 'A' for the wider use of the term. Moreover, attempts merely to equate the term simply with 'the Government' are frustrated by the fact that there is no clarity about the precise extent of the use of 'the Government' which does not seem to cover a number of

¹⁶³ Because the term here is concerned with the legal connection between the individual and the State (see Dugard *op cit* note 159 above at 22).

¹⁶⁴ From the preamble to the Promotion of Black Self-government Act 46 of 1959.

¹⁶⁵ Act 21 of 1971; and see the National States Citizenship Act 26 of 1970.

¹⁶⁶ See 215 above; and especially Dunsire ch 1.

¹⁶⁷ W Ivor Jennings *The Law and the Constitution* 5 ed (1959) 217. He does, however, qualify this by adding: 'It determines the organization, powers and duties of the administrative authorities.'

¹⁶⁸ No attempt will be made to furnish a definition of 'administrative law' here.

¹⁶⁹ Dunsire 4. Cf the globular description by Rose Innes *Judicial Review of Administrative Tribunals* 228.

'administering' bodies, such as local authorities, that we would usually class under the 'public administration' and that are subject to the principles of administrative law.

It will not help to use the term 'administration' to distinguish it, *functionally*, from 'the Government' (even if by 'Government' we mean only the State President-in-Executive-Council), on the basis that the latter determines policy and the former simply carries it out. Not only does this presuppose a clear distinction between *policy* and *administration*,¹⁷⁰ it also leads one into a complicated distinction between the Cabinet and its ministers.

The resort of some writers has been to adopt a *negative, institutional*¹⁷¹ description, counting as the 'administration' all those organs of State apart from those that are 'legislative' or 'judicial'.¹⁷² The difficulty with this is that the label of the institution depends largely upon its function, and it is not possible to make really satisfactory distinctions between the three functions of government, either in practice or in logic.¹⁷³ This means that we beg the very question we are asking and, since all organs of government perform all three functions, we are driven to saying that 'the administration' consists of all the organs of 'the State' apart from those almost solely concerned with legislating (that is, Parliament, the provincial councils and the homeland legislative assemblies) or adjudicating (the Supreme Court and (?) magistrates' courts, but not 'administrative' courts).¹⁷⁴

Finally, it is not always easy to distinguish between 'public' and 'private' administration. The fact that an institution wields statutory powers is not necessarily a guide,¹⁷⁵ nor is the fact that a body must or should act in the 'public interest' or provide 'public' services, since a number of obviously private charitable and other organizations would fall into this category.¹⁷⁶ Public finance may be a guide, but would we regard bakeries as part of the 'public administration' because their bread is government-subsidized?¹⁷⁷

While the question is of importance where administrative law differs from other law either in *substance* or according to the *courts*

¹⁷⁰ See, for instance, L G Baxter 'Constitutionalism, Bureaucracy and Corporatism' in L J Boule and L G Baxter (eds) *Natal and KwaZulu: Constitutional and Political Options* (1981) 75 at 106; *Supplement* (1981) 24ff.

¹⁷¹ Cf Vile 285.

¹⁷² For example, Henning op cit note 77 above at 90; D'Oliviera op cit note 77 above at 29-30. Cf Wiechers *Die Sisteamatiek van die Administratiefreg* op cit note 65 above at 87-8.

¹⁷³ Cf Marshall ch V and especially 114ff.

¹⁷⁴ Further difficulties arise for those who adopt the 'authority/power' approach to administrative law, in terms of which only those organs that wield superior power over the individual are in a true 'administrative-law relationship' (see, for instance, Wiechers *Administratiefreg* ch 3 and especially 68-71).

¹⁷⁵ For example, is the Estate Agents' Board (Act 112 of 1976 s 2) part of the 'public administration'?

¹⁷⁶ Cf Wiechers *Administratiefreg* 68.

¹⁷⁷ See further, for instance, Marshall *Constitutional Theory* 22ff; Dunsire ch 10; and Peter Cane 'Standing, Legality and the Limits of Public Law' 1981 *Public Law* 322 at 324-5.

which must apply it, for the most part it matters little what we call the 'public administration' in countries such as South Africa, where 'administrative law' is a part of the general body of law and largely administered in the ordinary courts (except where statutes provide otherwise, in which case one refers to the statute). And so, for the time being at least, we can continue to get away with rhetoric and equivocation when using the term 'the administration'.

CONCLUSION

As is evident, I am one of those who repudiates the personification of 'the State'¹⁷⁸ as being no more than metaphysical and unnecessary mumbo-jumbo for lawyers. While theories of personality may have a respectable part to play in political philosophy, any attempt to deduce *law* from them can, in my view, only cause one to lull oneself into a false sense of security and paper over the cracks of reality. Far better is to understand how terms such as 'the State' have *developed*, how they are *used*, and the process by which we *ascribe* legal consequences to certain activities, persons and institutions—legal consequences that do not derive from any inherent or natural characteristics of these activities, persons or institutions, but that derive from the law as stipulated by the cases and common law. This is particularly true, it is submitted, in the field of public law, where constitutionalism¹⁷⁹ dictates a strict approach to the interpretation of the powers of public bodies.

There is, besides, much advantage to be gained from maintaining a rich diversity of terminology.¹⁸⁰ Acceptance of this diversity removes the self-consciousness that otherwise leads to complicated and unnecessary repetition in the statutes which concern themselves with the machinery, possessions and functions of our 'State'.¹⁸¹

L G BAXTER*

THREE WORDS FROM THE LEGISLATORS . . .

'In the United States, Roscoe Pound's (1870-1964) writings have shown that law comprehends, independently of legal norms, a whole series of legal concepts and methods. One has a very incomplete grasp of what the law is if consideration is only given to its concrete rules at any given time. [Footnote:] For this reason one can see only a quip in the often cited words of Kirschmann: "Drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zur Makulatur" (Three words from the legislators, and entire libraries can go to the pulpmill)': René David and John E C Brierly *Major Legal Systems in the World Today* (1968) 10-11.

¹⁷⁸ Cf Rose Innes *Judicial Review of Administrative Tribunals* 228n2.

¹⁷⁹ One common value to which most lawyers would probably still subscribe.

¹⁸⁰ Cf Marshall 24-5.

¹⁸¹ As in the case of the way in which 'the Republic' has been used in the Constitution Act (see 224f above).

* BCom LLB (Natal) LLB Diploma in Legal Studies (Cantab), Attorney, Senior Lecturer in Law, School of Law Pietermaritzburg, University of Natal.